Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WT 02-100
Federal Preemption of Anne Arundel County Ordinance	)	

MOTION TO DISMISS

Anne Arundel County, Maryland ("County") hereby moves to dismiss the Petition for Declaratory Ruling filed by Cingular Wireless LLC ("Cingular") April 23, 2002 and supplemented April 29th.[1] Cingular challenges certain wireless siting amendments to the County's zoning ordinance for commercial telecommunications facilities. Section 332(c)(7)(B)(v) of the Communications Act, 47 U.S.C.§332(c)(7)(B)(v), reserves to federal and state courts exclusive jurisdiction over appeals from final actions of local governments in such matters.[2] The Commission lacks jurisdiction to resolve the Petition and must dismiss it.

Summary. The County ordinance is about zoning for commercial telecommunications facilities, including wireless sites. The amendments would apply to future applications by Cingular, a provider of personal wireless services as defined in Section 332(c)(7). Both legislative history and FCC interpretation of the federal statute acknowledge that review of final zoning actions is reserved -- with one exception not pertinent here -- to state or federal courts.

---

[1] By Public Notice, DA 02-1044, of May 7, 2002, corrected by Public Notice the following day, the Commission invited public comment on the Cingular petition by June 10th, replies by June 25th. It may conserve FCC and County resources to dispose of this motion prior to the initial comment deadline. Should the motion remain unresolved, or be decided against the County, we intend to comment fully on the merits within the appointed times.

[2] The ordinance, Bill No.93-01, was adopted January 22, 2002 and took effect March 8th. The text of the legislation is attached to the Supplement to Cingular's Petition.

The cases cited by Cingular either support this jurisdictional reservation or have been superseded by it.

The Ordinance. Cingular seeks to avoid the exclusive jurisdiction of the courts by claiming that the ordinance "regulates radio frequency interference." (Petition, 7) To support this characterization, the Petition (at 2) quotes selectively from the preamble to the ordinance. Read in full, the preamble announces that the ordinance (1) amends the definition of "commercial telecommunications facility;" (2) alters setback requirements for such facilities; (3) requires applicants to post security for removal of facilities; (4) mandates notification of property owners within a half mile of proposed sites; (5) provides for mitigation of "adverse visual impact;" (6) calls upon applicants to exhaust efforts to locate in commercially zoned property and to co-locate on existing facilities; and (7) adds other features of generic and special application to commercial telecommunications facilities. Plainly, this is a zoning ordinance whose adoption is to be reviewed only by the courts, not the FCC.[3]

Congressional and FCC Interpretations. The clear language of Section 332(c)(7)(B)(v) on the exclusive jurisdiction of the courts is reinforced by legislative history and the Commission's own pronouncements. At the time of enactment, Congress said:

> It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996

[3] The sole exception to exclusive judicial review involves appeals of local zoning actions that are inconsistent with federal safeguards against "the environmental effects of radio frequency emissions." Cingular, however, does not appear to be arguing this point, for its entire challenge is founded on alleged interference regulation. In any event, Section 10.125(k)(1) of the County ordinance is not "inconsistent with," but instead relies upon, the federal guidelines in Section 332(c)(7)(B)(iv).

> the courts shall have exclusive jurisdiction over all other disputes arising under this section.[4]

The Commission in turn has acknowledged the primacy of the courts in Section 332(c)(7) appeals:

> Allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than RF emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.[5]

The Cases. The cases cited by the Petition do not support FCC jurisdiction over Cingular's complaint about the County zoning ordinance. We have no quarrel at this time with Petitioner's characterization of the purposes of the 1982 amendments to Section 302 of the Communications Act (Petition, 5) concerning interference to home electronic equipment, nor with Petitioner's reading of *Freeman v. Burlington Broadcasters* on the same subject. (Petition, 6) But the County ordinance does not seek to address this kind of interference.

More to the point, but actually in the County's favor as regards jurisdiction, is *Southwestern Bell Wireless v. Johnson County Board of Commissioners*. (Petition, 7) Cingular is simply wrong to conclude that the FCC there "determined" that Johnson County was preempted or "asserted its exclusive jurisdiction over RFI matters." *Id.* Instead, these functions were performed by a federal district court and by the U.S. Court of Appeals for the Tenth Circuit. The FCC's role in the federal case was purely advisory, played out prior to final Johnson County

---

[4] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., 208.

[5] http://wireless.fcc.gov/siting/local-state-gov.html

action. Indeed, had the FCC's advice been determinative, there would have been no need for Southwestern Bell to go to court.

The Johnson County case, in fact, proceeded as the law requires. The wireless carrier, aggrieved by a local ordinance and a condition on its zoning use permit, took its claim to a federal district court. As Cingular concedes, the ordinance at issue in Johnson County bore strong resemblance -- despite differences which we will argue on the merits, if required -- to the Anne Arundel County zoning amendments challenged here. The Johnson County case properly was heard by the courts, not the FCC. The same should be true here.[6]

The Petition footnotes a couple of FCC decisions pre-dating Section 332(c)(7) of the Communications Act, prior to any special Congressional instruction about review of wireless facility zoning disputes. (Petition, 8, notes 31, 32) Moreover, these appear to be conventional broadcast radio and TV interference cases which would not control the disposition of personal wireless facility disputes under Section 332(c)(7).

Conclusion. The Anne Arundel County ordinance challenged by Cingular is about the placement, construction and modification of personal wireless service facilities. Challenges to this final action by the County belong in a court, not at the FCC. Cingular's Petition for Declaratory Ruling is a zoning grievance masquerading as a radio frequency interference complaint. If there are viable interference claims to be heard, they can be reviewed in the same

[6] The Second Circuit case, *Freeman v. Burlington Broadcasters* (Petition, 8, n. 31), lays out the same path of judicial disposition, although it is chiefly a Section 302 case about interference to home electronic equipment by a broadcaster and only tangentially a Section 332(c)(7) matter.

judicial forum to which federal law exclusively reserves the zoning challenges. The Petition must be dismissed.

Respectfully submitted,

ANNE ARUNDEL COUNTY, MD

By _____

Frederick E. Ellrod
James R. Hobson
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036-4320
(202) 785-0600

May 24, 2002

ITS ATTORNEYS

Certificate of Service

I certify that copies of the foregoing "Motion to Dismiss" have been served by regular mail and e-mail upon:

L. Andrew Tollin
Catherine C. Butcher
Wilkinson Barker Knauer, LLP
2300 N Street, N.W.
Washington, D.C. 20037

May 24, 2002

_____
James R. Hobson